Dow Jones and Company, Inc. *and* Independent Association of Publishers' Employees. Case 2–CA–24686

August 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On January 15, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel and the Union filed answering briefs; the General Counsel and the Union filed cross-exceptions and supporting briefs, to which the Respondent filed an answering brief; and the Respondent and the Union each filed briefs in reply to the other's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The facts of this case are more fully detailed in the judge's decision. In brief, the Respondent and Charging Party Independent Association of Publishers' Employees (IAPE, the Union) have a long-term collective-bargaining relationship. Their most recent collective-bargaining agreement of record was effective from February 1, 1990, until January 31, 1993. The bargaining unit covered by their agreement includes approximately 2000 of the Respondent's employees in over 50 offices throughout the United States, and also several offices in Canada. The significant events in this case occurred in the fall of 1990.[2] In September, IAPE proposed to its membership that it affiliate with the Communications Workers of America (CWA). An affiliation campaign followed, continuing until December, when the IAPE membership rejected the proposal. The Respondent openly and actively opposed the affiliation proposal during this time.

The complaint alleges, in essence, that, on various dates in the fall of 1990, the Respondent violated Section 8(a)(1) by enforcing its policies in such a way that: (1) CWA officials were discriminatorily ejected from the Respondent's facilities at South Brunswick, New Jersey, and at Liberty Street in New York City, where they had attempted to solicit support for the proposed affiliation; and (2) IAPE was discriminatorily denied the use of the Respondent's premises for the purpose of holding union meetings at the Respondent's facilities at South Brunswick, Liberty Street, Chicago, San Francisco, and White Oak, Maryland. The denial of the use of its facilities for IAPE meetings was also independently alleged as an unlawful unilateral change in employment conditions in contravention of past practice, thereby violating Section 8(a)(5) and (1), at the Respondent's Chicago, South Brunswick, Liberty Street, and Lexington Avenue, New York City locations.

The judge found that both the ejection of the CWA officials and the denial of the use of the Respondent's property for IAPE meetings constituted unlawful disparate treatment of activities protected by the Act. Accordingly, he concluded that the Respondent violated Section 8(a)(1) as alleged, with the exception of the allegation that the Respondent had unlawfully refused the use of its facility in San Francisco for an IAPE meeting. He found that the evidence did not support a violation at that location and he dismissed the allegation. He also dismissed the 8(a)(5) allegation, concluding that the evidence did not establish a past practice of the Respondent's permitting IAPE to use the Respondent's premises for union meetings. We affirm the judge's findings of violations but reverse his dismissal of the allegation relating to the San Francisco office. In addition, we reverse his dismissal of the 8(a)(5) allegation and find that the Respondent violated the Act in that respect as well.

1. The 8(a)(1) allegations

The judge found, and we agree, that the Respondent unlawfully denied IAPE's requests to meet on the Respondent's property at its facilities in White Oak, Chicago, South Brunswick, and Liberty Street. He effectively concluded that the Respondent's application of its policy precluding ''outside organizations'' from the use of its premises constituted unlawful disparate treatment as applied to IAPE, because the Respondent interpreted the same policy to permit meetings on its property for other organizations: for example, a women's group made up of the Respondent's employees and focused on workplace issues of particular interest to women; a minority employees' group also made up of the Respondent's employees and focused on minority-employee workplace issues; a weight-reduction program for employees conducted by an independent organization; and a similarly independently conducted smoke-ending program for employees.[3] The judge found that the Respondent could not permit this array of employee activities and meetings at its facilities and

[1] We correct the judge's citation of certain cases as follows: *D'Alessandro's, Inc.*, 292 NLRB 81 (1988); *Davis Supermarkets*, 306 NLRB 426 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993), cert. denied 114 S.Ct 1368 (1994).

[2] All dates are in 1990 unless otherwise indicated.

[3] The judge did not rely on evidence that HMO representatives and business-related vendors had been permitted onto the Respondent's property.

at the same time lawfully deny the same kind of access to IAPE, an organization not only existing for the purpose of representing the Respondent's employees on matters of terms and conditions of employment, but also made up entirely of the Respondent's employees.[4] The judge also properly concluded that the Respondent's particular interpretation of its policy—that an ''outside organization'' must have a ''Dow Jones business-related purpose'' to gain access to its meeting facilities—did not coherently and objectively distinguish between the activities permitted and the union activity denied.

In sum, we agree with the judge's application of this disparate treatment rationale and adopt his finding that the denial of IAPE's requests to meet at four Respondent facilities violated Section 8(a)(1). We also affirm his disparate-treatment analysis and his finding that the ejection of the CWA officials from two Respondent facilities violated Section 8(a)(1). The judge, however, dismissed the complaint allegation that the Respondent unlawfully refused to allow IAPE to use the conference facilities at its San Francisco office because, in his view, no evidence was submitted with regard to the circumstances at that location. We disagree.

Initially, we note that it is undisputed, and confirmed in documentary form in the record, that IAPE's request to meet at the San Francisco office was rejected by the Respondent because ''we do not provide our corporate meeting facilities for non-Company organizations.'' It is also beyond dispute that the Respondent's interpretation of its ''outside organization'' policy, permitting certain approved groups access to its premises but excluding IAPE, extended corporatewide. Thus, in each instance in this case of a request by IAPE for access to conduct a meeting, the request was rejected, or the rejection confirmed, by persons responsible for the Respondent's labor relations at the corporate level. Further, the Respondent's position prohibiting IAPE meetings on company premises because it was an ''outside organization'' was communicated to its managers companywide by the corporate official responsible for labor relations. Although the evidence of the Respondent's actually allowing certain organizations access to its premises, as described above and in the judge's decision, consists principally of instances occurring at its South Brunswick and Liberty Street facilities—the two largest bargaining-unit locations—there is no indication in this record, and the Respondent does not contend, that permission for the approved groups to use the Respondent's property was limited to those locations by some distinguishing circumstances. Rather, the extensive evidence of the Respondent's enforcement of its policy at those locations, which we have found unlawful, is representative of what the Respondent would, and would not, permit at its remaining bargaining-unit locations, including San Francisco. The Respondent's express reliance on this corporate policy in denying access to IAPE at San Francisco manifests a consistent corporatewide practice with unlawful disparate effect.

Accordingly, the Respondent's refusal to provide access to IAPE for a meeting in its San Francisco office was, like its refusal of similar requests in White Oak, Chicago, South Brunswick, and Liberty Street, guided by a discriminatory interpretation of its corporate policy and therefore violated Section 8(a)(1). See *Northeastern University*, 235 NLRB 858, 864–865 (1978), enfd. in relevant part 601 F.2d 1208 (1st Cir. 1979); *Columbia University*, 225 NLRB 185 (1976); see also *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983) (employer unlawfully denied union use of its bulletin boards at 25 different facilities based on corporate policy which, inter alia, allowed use of the bulletin boards only for ''company-approved'' or ''company-sponsored'' organizations).[5]

2. The 8(a)(5) allegation

With regard to the dismissal of the 8(a)(5) unilateral change allegation, the judge rejected the General Counsel's contention that, prior to the Respondent's conduct in the fall of 1990, the Respondent had generally permitted union-related meetings on company premises without significant restriction as a matter of established corporatewide practice. In essence, the judge held that although there was some evidence of past union meetings at various bargaining-unit locations, the Respondent should not be held accountable for the union-meeting policy, because, with the large number of facilities the Respondent had, ''it would be difficult for Respondent to know about each facility's policy,'' and that ''more importantly,'' in two instances—once in 1987 at South Brunswick and once in 1989 at South Brunswick and Liberty Street—the Respondent's corporate labor relations officials objected to IAPE's proposals to hold meetings on company premises.

We disagree with the judge, and we find that the evidence establishes that, prior to the fall of 1990, there was a corporatewide practice between the parties, consistent with a corporatewide policy established by the Respondent, permitting union meetings on com-

[4] All officers, officials, and members of IAPE were employees of the Respondent.

[5] IAPE excepted to the judge's failure to find that the Respondent's conduct in this case was the result of an unlawful motive, i.e., a desire to restrain its employees' discussion and evaluation of the affiliation proposal. In view of our disparate treatment analysis, we find it unnecessary to address the question of the Respondent's motive. The Respondent's denial of access to CWA officials and for IAPE meetings had a tendency to interfere with its employees' exercise of their Sec. 7 rights, regardless of motive, and this is sufficient to sustain the violations. See, e.g., *American Freightways Co.*, 124 NLRB 146, 147 (1959).

pany property. Accordingly, the Respondent's unilateral change in this unitwide practice and policy in the fall of 1990, without providing the Union an adequate opportunity to bargain about the matter, violated Section 8(a)(5).

It is well settled that an employer's ''past practice'' refers to an activity which has been satisfactorily established by practice or custom. See *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988), and cases cited there. The judge's factual findings establish that from about 1987 until the fall of 1990 the Respondent permitted union meetings to be held at the Respondent's unit locations in Boston, Washington, D.C., Dallas, Chicago, and especially at its largest unit facilities, comprising about half of the approximately 2000-employee corporatewide unit: South Brunswick (about 600 unit employees), Liberty Street (about 400 unit employees), and Lexington Avenue. Significantly, there is no evidence that, prior to the fall of 1990, the Respondent ever denied permission for a union meeting on its premises. The judge's major support for his finding that the General Counsel had failed to establish a past practice—that in 1987 and 1989, Respondent ''objected to proposed union meetings and informed [the union] that such meetings were against Respondent's policy''—is completely undermined by the fact that the Respondent ultimately permitted the Union to hold its meetings on its premises in both instances. On both occasions, the Union was allowed to hold its meetings after the Respondent was satisfied that there was no reasonable potential that the proposed meeting would cause a disruption of the Respondent's operations. This is a condition which is arguably implicit in any party's granting of permission to use its facilities, and the fact that the parties engaged in discussions prior to the grant of permission to insure that no such disruption would occur does not mean that the Respondent was placing any significant restrictions on the Union's use of its facilities. The record does not indicate that the Respondent at any time placed any restriction on the purposes for which the Union could hold its meetings.

Thus, in view of the evidence showing that union meetings were permitted on the Respondent's premises prior to the fall of 1990, and the absence of any evidence showing that the Respondent ever denied the Union's request to hold union meetings on its premises, or even placed restrictions on the purposes for which such meetings could be held, we find that there existed a consistent corporatewide past practice whereby the Respondent permitted the Union to hold meetings on the Respondent's facilities without restriction. For the reasons discussed below, we also find that this corporatewide past practice was consistent with the Respondent's corporatewide policy that existed prior to the fall of 1990 to allow such meetings on its premises.

In the fall of 1990, after the proposal for IAPE to affiliate with the CWA became generally known, the Respondent notified the Union of what the Respondent then asserted was its corporate policy concerning union meetings on company premises. More specifically, a letter dated October 5 from the Respondent's corporate director of labor relations, Frank Barr, to IAPE President Ron Chen, stated in relevant part: ''We have refused . . . requests [for use of the Respondent's premises for union meetings at the White Oak and San Francisco unit locations] and you should be aware that we do not provide our corporate meeting facilities for non-company organizations.'' Similarly, in a letter dated October 17, Barr informed Chen: ''As we have already informed you, we do not allow non-Company organizations to use our facilities for meetings, and therefore must deny IAPE the use of our premises for your Annual Meeting.'' In a memorandum also dated October 17, from Barr to the Respondent's managers companywide, Barr explained, in relevant part: ''Please be advised that our policy is that our corporate premises are not provided for meetings of any outside organizations, including IAPE.''

These statements by Barr establish that the Respondent's policy concerning union meetings on company property as of October 1990 was a companywide one and, therefore, a policy affecting all bargaining-unit locations. Clearly, these statements stand in stark contrast to the evidence above of union meetings held on the Respondent's premises without prohibition at various unit locations prior to the fall of 1990. In view of the evidence showing that a corporatewide past practice existed of permitting union meetings at the Respondent's facilities and the evidence of the corporatewide application of the Respondent's 1990 policy announcing the prohibition of such meetings, it is reasonable to infer that the corporatewide policy between the parties up to the fall of 1990 was for the Respondent to permit union meetings on its premises. Accordingly, the Respondent's 1990 announcements prohibiting IAPE meetings on its property constituted a unilateral change in both the unitwide past practice between the parties and in its corporatewide policy.

Our dissenting colleague asserts that we err in finding that a corporatewide policy existed that permitted the Union to use the Respondent's facilities for meetings without restriction, because, in his view, there is insufficient evidence to support such a finding at any specific facility and such evidence as there is will not support an inference that the past practice and policy was corporatewide. We reject these contentions. As to the former, only by summarily rejecting as ''sporadic'' and ''isolated'' the evidence regarding union meetings at the Boston, Washington, Dallas, and Chicago facilities, and then rejecting as ''periodic'' the evidence regarding a ''series of meetings'' at the South Brunswick

and Liberty Street facilities, can our dissenting colleague fit the evidence adduced to his analysis and find insufficient evidence to support a finding that there was a past practice and policy of allowing union meetings without restriction at these five facilities.

As to whether we can infer a corporatewide past practice and policy from the evidence of the past practice at the five facilities discussed above, we emphasize that such an inference is no different than the one our dissenting colleague is willing to make in joining our 8(a)(1) finding that the Respondent discriminatorily denied the Union access to its San Francisco facility. As noted above, there was no evidence that non-IAPE access was allowed at that facility, but we inferred that such access was allowed and took place there based on, inter alia, evidence that at its two largest unit locations, South Brunswick and Liberty Street, the Respondent permitted non-IAPE groups to meet. This evidence, which we inferred was representative of what the Respondent would and did permit at *all* its facilities, including San Francisco, supported our extension of the 8(a)(1) disparate treatment violation to that facility. Similarly, from the evidence showing that the Union was allowed access for meetings at various of the Respondent's facilities prior to October 1990, including its two largest facilities, we infer that such access was representative of the practice and policy that existed at all of the Respondent's facilities unitwide. For these reasons, and contrary to our dissenting colleague's assertions, we find the evidence of the corporatewide past practice fully supports our inference that a corporatewide policy consistent with that corporatewide past practice existed prior to the fall of 1990, at which time the Respondent announced its new corporatewide policy forbidding such meetings.

Finally, the Respondent contends that, even assuming that it made a unilateral change in the parties' past practice concerning union meetings on its premises, the Union failed to request bargaining on receiving notice of the change, and that, accordingly, the Union waived its right to bargain about the matter. We disagree. The Union's first notice that the Respondent had made a unitwide change in the past practice and policy was Barr's October 5 letter to Chen referred to above. The tone and tenor of this letter (''[Y]ou should be aware that we do not provide our corporate meeting facilities for non-company organizations.'') made it clear to the Union that this prohibitory policy had been established and was now in place. In any event, the letter certainly does not amount to a *proposal* for a change in terms and conditions of employment; rather, it implies clearly that the policy is already in effect. Barr's October 17 letter to Chen conveyed the same message. Thus, we find that the Respondent's new policy prohibiting union meetings on its property was fully in effect at the time the Union was made aware of it, i.e., that it was a fait accompli. Accordingly, the Union was not required to request bargaining in order to preserve its rights under the Act. See, e.g., *Century Wine & Spirits*, 304 NLRB 338, 347 (1991); *Storer Communications*, 297 NLRB 296 (1989); *Migali Industries*, 285 NLRB 820, 821 (1987).

Therefore, because the Respondent unilaterally changed the unitwide past practice and policy permitting union meetings on company property without providing the Union an adequate opportunity to bargain about the matter, the Respondent violated Section 8(a)(5) and (1).

3. The remedy

We will modify the judge's recommended Order to include a remedy for the 8(a)(5) violation found above. In addition, we will provide cease-and-desist sanctions for the Respondent's 8(a)(1) violations—the usual Board remedy for an unlawful, discriminatory denial of access to an employer's property for the exercise of protected rights. See, e.g., *Richards United Super*, 308 NLRB 201 (1992); *Davis Supermarkets*, 306 NLRB 426 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993), cert. denied 114 S.Ct 1368 (1994). We note that the judge required in his order that the Respondent provide written notification to IAPE as part of the remedy for the 8(a)(1) denial-of-access violations. The affirmative provisions of our remedy for the 8(a)(5) violation include, as a matter of routine, a requirement that the Respondent give written notification to IAPE when it has restored the past practice and policy of permitting union meetings on company premises. See, e.g., *Ernst Home Centers*, 308 NLRB 848, 866 (1992); *Granite City Steel Co.*, 167 NLRB 310 (1967). Because of the adequacy of this remedial provision, we need not pass on the judge's recommendation that similar relief be afforded to remedy the 8(a)(1) violations.[6]

[6] Chairman Gould finds no need in the circumstances of this case for the affirmative remedy proposed below by Member Browning. He notes that the General Counsel has not requested such a remedy. Furthermore, the Chairman notes that compliance with the affirmative restoration remedy for the 8(a)(5) violation found here necessarily entails permitting nonemployee invitees to attend IAPE union meetings in accord with past practice. Morever, the Chairman finds that an implicit element of compliance with the Board's traditional cease-and-desist sanction for an 8(a)(1) discriminatory denial of access is the granting of nondiscriminatory access to nonemployee union representatives for a reasonable period of time in accord with the access policy and practice in effect prior to the unfair labor practice. The Respondent cannot circumvent these remedial obligations by claiming a subsequent revision of policy so as to deny all outside organizations access to its facilities.

Member Stephens agrees that Member Browning's remedial proposals are unwarranted in this case.

Member Browning would further order the Respondent to notify the CWA that in the future it will not be denied equal nondiscriminatory access for the purpose of engaging in activities protected by the Act. In addition, in Member Browning's view, the Respondent's denial of access to the CWA denied the Respondent's employees

Continued

In light of the unitwide nature of the Respondent's unlawful conduct in this case, we will order that the Board's notice be posted at each of the Respondent's facilities in the United States where IAPE represents employees. The Union also represents employees of the Respondent in several unit locations in Canada, and the judge ordered posting of notices at these Canadian locations as well. As a general rule, however, the Act's jurisdiction does not extend to employees outside the United States. See, e.g., *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 144 (1957). Accordingly, we will delete this portion of the judge's Order.

We will also conform the language of the Board's notice to that of our Order in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Dow Jones and Company, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to allow the Independent Association of Publishers' Employees (IAPE) equal and nondiscriminatory access to company facilities in order to conduct meetings of its members.

(b) Refusing to allow representatives of the Communications Workers of America equal and nondiscriminatory access to company facilities.

(c) Refusing to bargain collectively with IAPE as the exclusive representative of the employees in the appropriate unit, as that unit is set forth in the parties' collective-bargaining agreement effective from February 1, 1990, until January 31, 1993, by unilaterally changing the parties' past practice and the Respondent's policy permitting union meetings on company premises without providing IAPE an adequate opportunity to bargain about the matter.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the parties' past practice and the Respondent's policy permitting union meetings on company premises, and give IAPE written notification that this has been done.

(b) Notify IAPE and on its request bargain in good faith to agreement or to impasse prior to changing the parties' past practice and the Respondent's policy permitting union meetings on company premises.

(c) Post at each of its facilities in the United States where IAPE represents the Respondent's employees, in places where such notices are customarily posted, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 2, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER STEPHENS, dissenting in part.

I agree with my colleagues that the Respondent's ejection of the CWA officials and its denial of the use of its premises for IAPE meetings constituted unlawful disparate treatment in violation of Section 8(a)(1), and I agree with the amended remedy my colleagues set forth concerning those 8(a)(1) violations. I do not agree, however, that the Respondent violated Section 8(a)(5) by unilaterally changing a past practice generally permitting IAPE meetings on company property, because, in my view, the General Counsel did not provide adequate evidence to establish that such a past practice existed within the bargaining unit. Further, although I concur in the judge's dismissal of this allegation, I do so solely on the following grounds.

Where it is alleged that an unlawful unilateral change in employment conditions has been made which contravenes the contractual parties' past practice, it is the General Counsel's burden to demonstrate

their Sec. 7 right to have access to information concerning the affiliation campaign. Accordingly, she finds that the Respondent must be ordered to permit limited access to the CWA in order to fully remedy the denial of the employees' rights. Because the CWA was denied such access on two separate occasions extending over an approximate 1-month period, Member Browning would require the Respondent to notify the CWA that, upon request, it will be allowed access to the Respondent's facilities for a 1-month period to conduct an affiliation campaign. Because the cease-and-desist provisions of par. 1(b) of the Order below could potentially fail to provide a full remedy for the employees' denial of rights in regard to the CWA's affiliation campaign, Member Browning would require the above access to the CWA whether or not the Respondent, subsequent to the events at issue in this case, may have revised its policy so as to deny *all* outside organizations access to its facilities. The fact that the General Counsel has not requested this remedy would not preclude the Board from giving it. *R.J.E. Leasing Corp.*, 262 NLRB 373 fn. 1 (August 30, 1982 Order). Member Browning agrees with the Chairman's statement that the Respondent cannot circumvent its remedial obligation to grant nondiscriminatory access to the CWA for a reasonable period of time by claiming that it has subsequently revised its access policy so as to deny access to its facilities to *all* outside organizations. She would simply go one step further than the Chairman, and expressly require the Respondent to make an affirmative offer of the above-described limited access to its facilities to the CWA.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

by a preponderance of the evidence the existence and nature of that practice. *Whirlpool Corp*., 281 NLRB 17, 22 (1986). In *Exxon Shipping Co*., 291 NLRB 489 (1988), the Board agreed with the judge's statement of general legal principles regarding what constitutes a ''past practice'':

> The Board has historically required that the change complained of must be of an activity which has been ''satisfactorily established'' by practice or custom; an ''established practice''; an ''established condition of employment.'' *Granite City Steel Co*., 167 NLRB 310, 315 (1967); *Chef's Pantry*, 274 NLRB 775 (1985), a ''long-standing practice''; *Brotherhood of Locomotive Firemen*, 168 NLRB 677, 680 (1967). See *Gulf States*, 261 NLRB 852, 862 (1982).

Exxon, supra at 493. Additionally, in proving the existence of a past practice, it is an obvious requirement that the party being requested to abide by the practice be shown to have known of and acquiesced in it. See, e.g., *BASF Wyandotte Corp*., 278 NLRB 173, 180 fn. 21 (1986).

The critical issue here is whether, before the fall of 1990, the Respondent acquiesced in a status quo—sufficient to create a bargaining obligation—whereby the Union routinely was permitted unrestricted access to company property to hold union meetings. In section III of his decision, the judge made findings of fact concerning union meetings at a total of seven of the Respondent's bargaining-unit facilities prior to the fall of 1990. Relying on these factfindings, I would conclude that the instances of union meetings at 4 of these offices—Boston (3 meetings in 1987), Washington, D.C. (1 meeting in 1987), Dallas (1 meeting some time prior to 1987), and Chicago (1 meeting in 1988)—provide insufficient evidence to establish that the past practice at issue existed, either bargaining-unit wide (i.e., at over 50 locations) or even with respect to any individual location cited above.

Although the evidence is somewhat more detailed regarding the Respondent's three largest bargaining-unit facilities—at Liberty Street and at Lexington Avenue in New York City, and in South Brunswick, New Jersey, my conclusion is the same. Thus, the record establishes that the Respondent was aware of, at best, exactly one union meeting at Lexington Avenue, in early 1988. In addition, the judge found that IAPE held ''annual membership meetings'' on the Respondent's premises in South Brunswick and Liberty Street in 1988, in January 1989, and in December 1989. At best, one might find that the Respondent had knowledge of two of these sets of membership meetings—in January 1989 and December 1989—and it raised objections to the latter before allowing them to take place pursuant to an ad hoc accommodation. Thus, Frank Barr, the Respondent's corporate director of labor relations, contacted IAPE President Chen and objected to the December 1989 membership meetings being held at the Respondent's facilities on grounds that they might be disruptive. Based on Chen's assurances that there would be no disruption (possibly six employees, possibly fewer, had attended previous membership meetings), and because Chen had stated that IAPE's bylaws required that the annual membership meetings be held before the end of the calendar year, Barr permitted the December 1989 meetings to take place to ''accommodate'' the Union.

It is apparent that, in 1987 and again in the spring of 1990, the Respondent permitted a series of meetings to be held at South Brunswick and Liberty Street for employees to discuss the status of collective-bargaining negotiations and tentative contract terms. It is quite clear that these two sets of meetings, which were held 3 years apart, addressed a specific purpose: the progress of negotiations toward a new collective-bargaining agreement. Accordingly, their significance is sharply limited, if significant at all, with regard to the allegation that a past practice existed wherein the Respondent permitted union-related meetings *without restriction*.[1]

In sum, with respect to the relevant 4-year period prior to the fall of 1990, the General Counsel has provided evidence of the alleged past practice which covers only 7 of the 50-plus bargaining-unit locations. Of these seven, the Boston facility had the largest number of union meetings—three—and these three all occurred in 1987, at least 3 years before the alleged unilateral change. The other six locations had fewer than three such meetings during the relevant period. These meetings were therefore remarkably few in number, sporadic, and isolated. The evidence does not establish that the alleged unrestricted past practice existed at *any* unit facility, much less on a broader basis consistent with the multilocation bargaining unit. The only evidence showing the Respondent consistently permitting union meetings involved the collective-bargaining negotiations of 1987 and the spring of 1990: the periodic, limited nature of these meetings provides virtually no significant support for the allegation that the Respondent generally permitted union-related meetings without restriction. Accordingly, I would find that the General Counsel has not proven that a past practice existed between IAPE and the Respondent of permitting union meetings on the Respondent's property without restriction as to purpose, and that therefore a vital premise

[1] The judge also found that the Respondent objected to one of the 1987 meetings being held in the employee lounge at South Brunswick because of a perceived potential for disruption. The meeting was subsequently held in the employees' cafeteria pursuant to an agreement between the Respondent and the Union.

is absent for finding a unilateral change in a term and condition of employment within the bargaining unit.

My colleagues, however, draw the conclusion that, prior to the fall of 1990, there was a unitwide past practice, as well as a companywide policy, permitting IAPE meetings on company property. This conclusion relies on the evidence the General Counsel provided concerning past union meetings at the seven unit locations, the absence of evidence that the Respondent ever effectively prohibited such meetings in the past, and the undisputed fact that the Respondent announced a blanket policy which prohibited IAPE meetings on its property in the fall of 1990.

As I have discussed above, the General Counsel's evidence of prior union meetings is too meager to establish a generalized practice or custom between the parties to the collective-bargaining agreement. Further, the majority's central hypothesis is that if the Respondent announced a companywide policy *prohibiting* union meetings on its property in the fall of 1990, as a matter of inference this policy must have replaced a companywide policy *permitting* union meetings. This inference, however, is unsupported by any significant evidence.[2] In fact, if any companywide policy existed concerning union meetings prior to the fall of 1990, the evidence at the very least creates an impression that the Respondent's view was to *prohibit* them as presumptively creating a disruption of the normal use of the Respondent's property. This was the Respondent's position with respect to the 1987 instance at the South Brunswick facility and the 1989 instance involving both South Brunswick and Liberty Street.[3]

Accordingly, the complaint allegation that the Respondent unilaterally changed an established past practice in the fall of 1990 by prohibiting union meetings should be dismissed for lack of sufficient evidence, and I dissent from my colleagues' finding of an 8(a)(5) violation in this matter.[4]

[2] My colleagues assert that the inferential analysis for their 8(a)(5) finding is the same as that employed to find an 8(a)(1) disparate-treatment violation at the Respondent's San Francisco facility—an unfair labor practice finding with which I agree. There is, however, a difference of substance between the two analyses. Regarding the 8(a)(1) violation, the Board evaluated the Respondent's *documented* corporatewide policy prohibiting IAPE meetings in light of the evidence that the Respondent did permit groups similar to IAPE to meet on its premises at various locations. Evaluation of this evidence yielded a reasonable inference of what the Respondent would and would not permit at all of its corporate locations, including San Francisco, and consequently yielded a conclusion that the application of this policy at the San Francisco facility was discriminatory and unlawful.

With regard to the majority's 8(a)(5) analysis, they consider the scanty historical evidence of IAPE access at a few bargaining-unit locations, and infer therefrom a cohesive past practice at these sites. They further infer, with no additional evidentiary support, that such a past practice existed at all 50-plus unit locations. As a result of these inferences, they divine that a corporatewide policy existed permitting union meetings at all of the Respondent's locations without restriction. As I have set out in detail above, the evidence in fact does not establish a relevant past practice at *any* single bargaining-unit location, by inference or otherwise. Without this as an absolute minimum, the majority's inferential chain simply does not hold.

[3] That the union meetings were eventually held in the 1987 and 1989 incidents does not prove that the Respondent did not have a policy at least presumptively forbidding union meetings on its property; each of these meetings was held pursuant to discussions and an accommodation between the Respondent and the Union.

[4] I also note, regarding the past-practice issue, that the complaint alleges an 8(a)(5) violation at only 4 unit locations, while the majority has found this violation unitwide, i.e., at over 50 locations. A unitwide 8(a)(5) violation was not a matter litigated by the parties, it is not consistent with any theory of the violation propounded by the General Counsel or the Union, and, as discussed above, it is not supported by a preponderance of the evidence.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to allow Independent Association of Publishers' Employees (IAPE) equal and nondiscriminatory access to our facilities in order to conduct meetings of its members.

WE WILL NOT refuse to allow representatives of the Communications Workers of America equal and nondiscriminatory access to our facilities.

WE WILL NOT refuse to bargain collectively with IAPE as the exclusive representative of our employees in the appropriate unit, as that unit is set forth in the parties' collective-bargaining agreement effective from February 1, 1990, until January 31, 1993, by unilaterally changing the parties' past practice or our policy permitting union meetings on company premises without providing IAPE an adequate opportunity to bargain about the matter.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the parties' past practice and our policy permitting union meetings on company prem-

ises, and WE WILL give IAPE written notification that this has been done.

WE WILL notify IAPE and on its request bargain in good faith to agreement or to impasse prior to changing the parties' past practice or our policy permitting union meetings on company premises.

DOW JONES AND COMPANY, INC.

Mindy Landow, Esq., for the General Counsel.
Richard Muser, Esq. (Clifton, Budd & DeMaria), for the Respondent.
Lowell Peterson, Esq. (Robinson, Silverman, Pearce, Aronsohn & Berman), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in New York, New York, on April 20, 21, and 29, 1992. The unfair labor practice charge and first amended charge were filed on October 9 and 10, 1990,[1] by Independent Association of Publishers' Employees (the Union). The complaint issued on April 18, 1991; on February 11, 1992, a consolidated complaint issued, consolidating this matter with Case 2–CA–24770. On March 30, 1992, another consolidated complaint issued, further amending the consolidated complaint. At the opening of the hearing the allegations in the consolidated complaint regarding the allegations of Case 2–CA–24770 were severed from the remaining allegations due to a pending Motion for Summary Judgment before the Board. Subsequent to the close of the hearing, and after receipt of briefs, these two cases were again consolidated. However, when the parties settled the allegations contained in Case 2–CA–24770 it was again severed. Therefore, the only allegations remaining before me are those contained in Case 2–CA–24686. They are that Dow Jones and Company, Inc. (Respondent) disparately maintained and enforced a rule prohibiting solicitations by outside organizations on Respondent's premises by prohibiting union-related solicitations and meetings, while permitting nonunion-related solicitations and meetings by outside organizations on its premises. Six examples, occurring between September 24 and October 17, at Respondent's facilities throughout the country are given, each allegedly violating the Act. The complaint further alleges that on about October 17 Respondent informed the Union that it would not be permitted use of Respondent's facilities for its meetings. It is alleged that up until about September, Respondent permitted the Union access to its facilities for conducting meetings at six named facilities of Respondent and that by departing from this practice, without first affording the Union an opportunity to negotiate about this change, a mandatory subject of bargaining, Respondent violated Section 8(a)(1) and (5) of the Act.

On the entire record, including my observation of the witnesses, I make the following

[1] Unless indicated otherwise, all dates referred to here relate to the year 1990.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with an office and place of business in New York City, as well as numerous other offices, has been engaged in the publication, circulation, and distribution of various daily and weekly financial news publications distributed throughout the United States. Annually, Respondent derives gross revenues in excess of $200,000 from its various publications, including the Wall Street Journal and Barron's Financial and Business Weekly and subscribes to various interstate news services. Respondent also publishes various nationally syndicated features and advertises various nationally sold products. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union and the Communication Workers of America (CWA) are each labor organizations within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Union has been the collective-bargaining representative for certain of Respondent's employees at 55 locations throughout the United States and Canada. The last two collective-bargaining agreements between the parties were for the periods 1987 through 1990 and 1990 through 1993. Most of the 55 locations are small offices with only a few employees and are not directly involved here. The offices that are most directly involved are Respondent's facility in South Brunswick, New Jersey (South Brunswick), with 1100 employees, about 600 of whom are represented by the Union, and an office located at 200 Liberty Street in New York City (Liberty Street), with 600 employees, 400 of whom are represented by the Union. Also involved here are substantially smaller offices in White Oak, Maryland (White Oak), Chicago, Illinois, Washington, D.C., 420 Lexington Avenue, in New York City (Lexington Avenue), and some other offices that may be mentioned briefly. The Union is an independent Union, whose members and officers are all employees of Respondent. The Union represents Respondent's employees only.

Stated briefly, the General Counsel and the Charging Party allege that for many years Respondent has allowed the Union to conduct meetings of its members (Respondent's employees) at its various facilities without restriction. In about September Respondent promulgated a rule prohibiting such meetings at Respondent's facilities, without first negotiating with the Union about this change in procedure. The alleged reason for the new rule is that the union leadership had recommended to the membership that the Union affiliate with the CWA, and scheduled a membership vote on the subject. Respondent, admittedly against any affiliation with the CWA, promulgated the new rule against meetings at its facilities to assure that the affiliation would be defeated, it is alleged. Additionally, the General Counsel alleges disparate treatment; at the same time that Respondent was excluding union meetings, it was allowing all sorts of other organizations to solicit at its facilities. The complaint alleges four incidents between about September 24 and October 17 where

Respondent refused to allow the Union to hold meetings at its facilities, and two situations on about October 4 and 9 when Respondent removed representatives of the CWA from its facilities. Respondent defends that the rule as set forth in writing in September was not new; it had always prohibited non-Dow Jones business at its facilities. In addition, Respondent defends that the Union has not been injured by the rule because its members and officers can still meet at its facilities. It is only meetings that are prohibited.

There was a substantial amount of testimony about the practice at Respondent's facilities when the Union wanted to have meetings of its members prior to the fall of 1990. David Wessel was employed by Respondent in its Boston office from 1984 through 1987 and was transferred to Respondent's Washington office, where he is presently employed. He testified that while he was employed in Boston, where he was the local director for the Union, three meetings were held in the lunchroom at the facility. At these meetings the members discussed a dues increase, a contract settlement, and whether to affiliate with another union. He publicized the meetings with a notice on the Union's bulletin board and a note on the door leaving the office. Twelve to fifteen employees attended each of these meetings. Wessel also arranged a meeting at the Washington facility. The meeting took place on October 23, 1987, and was to introduce the staff to Ron Chen, who had recently been elected president of the Union. Wessel called June Kronholz, who was the deputy bureau chief of the Washington office and asked her permission to use the room for a union meeting and she agreed. The meeting took place in a room where staff meetings take place. About 20 employees attended. Chen testified that while he was at the Washington office during this meeting he saw Al Hunt, the bureau chief of the facility sitting in his office. Another union meeting was held in this room in late 1990 to discuss affiliation with the CWA. Virgil Hollender, an employee of Respondent in South Brunswick, testified that while he was employed by Respondent in Dallas, Texas, he observed a meeting of Respondent's composing room employees. Robert Colnaghi, a director for the Union at White Oak, testified that in about 1985, shortly after he became a director for the Union, Dick Doyle, his immediate supervisor, congratulated him on his new position, and said that if there was anything he could do to help him, to let him know. For example, if he needed a conference room, one was available for the asking. Colnaghi never asked.

Chen testified that he met with the union members at the Chicago office in September 1988. A hearing involving an ex-employee was scheduled to be heard at that time, so Chen asked one of the union members to notify the members that he would be at the facility. When he arrived he saw a notice posted on the bulletin board announcing his arrival. He introduced himself to the employees and shook hands with them shortly before they were scheduled to leave for the day. While he was there he met Nancy Ruffner, Respondent's manager of employee relations, and Sporty King, a manager for Respondent. They gave him a key to the conference room on the premises, but Chen never used it as the employees preferred to talk in the hallway. Chen also testified that he met with the employees at Lexington Avenue once or twice a year since becoming union president. On the first occasion, in early 1988, he met with the employees in the employees' lounge sometime in the afternoon. While there, he saw notices posted announcing his visit. On that visit, as well as the subsequent visits to Lexington Avenue, he met with, and spoke to, the employees at the facility in the employees' lounge and spoke to the managers of the facility.

Chen testified that the parties completed negotiations for a new contract in the spring of 1990 and, at that time, he conducted numerous meetings with the membership to present the terms of the agreement. In this regard he met with about 40 to 50 members in the employee lounge at Lexington Avenue over a 3- to 4-hour period. Notices of the meeting had been posted on the Union's bulletin board, the walls, and the lobby at the facility. At about the same time, he conducted four meetings throughout 1 day in South Brunswick, from noon through 5 p.m., in the cafeteria, conference room, and auditorium. In addition, he held annual membership meetings at South Brunswick and Lexington Avenue in 1988. At South Brunswick they met in the cafeteria; at Liberty Street, they met in the room adjoining the cafeteria. In January 1989, the Union held simultaneous meetings in South Brunswick and Liberty Street. The Union's annual meetings are publicized in a number of ways; through mailings to the members as well as postings throughout the facilities, and the 1989 meetings were no exception to that. Chen testified that in about November 1989 the Union posted notices at Liberty Street and South Brunswick announcing membership meetings at those two locations: Liberty Street in the cafeteria at 1 p.m. on December 11, 1989, and in South Brunswick in the cafeteria at noon on December 12, 1989. Shortly thereafter, he received a call from Frank Barr, Respondent's director of labor relations, saying that he was bothered by the fact that he had seen a union posting for annual membership meetings at South Brunswick and Liberty Street, and that he would have a problem with it. When Chen asked why, Barr said that the meetings would be disruptive. Chen said that the Union's bylaws require annual membership meetings and that they are not ''overwhelmingly attended''; that rarely do more than six people come to the meetings. He also told Barr that they had similar meetings in the past and they were not disruptive. Barr said that he would get back to him, but never did, and the meetings went on as planned.

As regards the 1987 meetings, Joe Nyitray, Respondent's employee relations manager, testified that he saw a union notice announcing that Chen would be available with other union officers to answer questions in the employees' lounge at South Brunswick. Because of his ''concern,'' he spoke to Barr about ''what I termed a meeting taking place in the employee lounge.'' Barr agreed with his concern and he discussed it with the Union and the notice was removed. Chen wrote to Nyitray, by letter dated July 27, 1987: ''Attached please find copy of union posting in South Brunswick that you found objectionable.'' After suggesting a method of settling the matter, Chen concluded: ''This matter ought to be resolved quickly as I plan frequent lunch gatherings to introduce myself to IAPE's members at your location.'' In late 1987, shortly after becoming union president, Chen held a meeting of union members in a conference room next to the legal office in South Brunswick to discuss terms of the new contract. Several of Respondent's managers, including Larry Witham, Respondent's director of employee relations, were

present until Chen asked them to leave because he felt that the members would be more comfortable in their absence.

Barr testified that Respondent's policy is ''not to let other groups or organizations use our facilities, unless there is a Dow Jones business related purpose to it.'' He testified that the first time that the Union's use of Respondent's facilities for meetings came to his attention was when he received Chen's July 27, 1987 letter. The next time that the situation came to his attention was in late 1989 when Witham showed him a union posting dated November 7, 1989; the posting stated that the Union's annual membership meeting would be held on December 11 and 12, 1989, at 1 p.m. in the cafeteria at Liberty Street and at noon at the cafeteria in South Brunswick. Barr called Chen and told him that Respondent was concerned because they did not allow meetings in their cafeterias and that it would be disruptive for the people eating in the cafeteria. Chen said that they had a similar meeting the prior year and no more than two or three people came by to speak to him. Barr said that he wasn't aware that the Union had such a meeting the prior year. Chen said that if Barr didn't even know about it, it could not have been disruptive. He also told Barr that their bylaws required that they have a meeting in the calendar year. Barr discussed the situation with Witham and called Chen and told him that because of his assurances, that they would try to ''accommodate'' the Union. Since there wasn't much time left for the Union to have its meeting, and ''since it was just going to be a couple of people and would not, it really wouldn't amount to a meeting, in the true sense of the word, that would be disruptive of the cafeteria, that I would allow him to have it in 1989.'' The next occasion that the subject arose was in the summer of 1990 when the Union requested the use of conference rooms in South Brunswick and Liberty Street to describe the contract that Respondent and the Union had recently agreed to. The meetings were planned for ''after hours'' and Respondent agreed to allow the Union to use the rooms. Barr testified to the distinction that Respondent draws between a meeting and union officials such as Chen meeting informally with employees on its premises. Since Chen and the other union officers are all employees of Respondent they can eat in the cafeterias and meet and talk to fellow employees while there: ''But that can't be boot strapped into a meeting in the cafeteria, that's going to take over a portion of it and disrupt it . . . .''

Nyitray testified that in mid-1987 he saw a notice posted on the Union's bulletin board announcing that Chen would be available to answer questions on contract developments on July 24, 1987, between 12 and 1:30 p.m. in the employees' lounge. He testified that it was the first time that he had seen such a document and the first time that he learned that the Union intended to have a meeting on the premises. He contacted Barr and told him that they did not allow anyone to ''take over'' the lounge without first requesting to do so, and a meeting in the lounge would disrupt its normal usage. Barr agreed and Nyitray called Paul Judd, a bargaining committee member who was supposed to be at the meeting with Chen and told him that Respondent objected to a meeting taking place at the employees' lounge ''taking up the facility.'' He told Judd that, even though the notice didn't say meeting, the Union was inviting people to meet in the employees' lounge, ''a facility that people normally used and would not be able to use.'' Judd asked if he meant that the Union could not meet with its members in the cafeteria. Nyitray said that Respondent did not mean to stop employees from stopping to talk to Chen while they were having lunch in the cafeteria; what Respondent did not want was a meeting that would take over and disrupt the facility. Nyitray testified that Chen met with employees on the day in question. He asked his secretary ''just to make sure that there was no disruption'' and she told him that a few people were standing around Chen's table while he was having lunch.

Virgil Hollender, a union vice president, testified that in 1990 he arranged for meetings of union members to discuss the new contract terms. Chen asked him to set up these meetings. He asked Nyitray for meeting space, and in about April Nyitray told him that the Union could use an auditorium in South Brunswick after work and in about early June the Union held a meeting in this auditorium at 5 p.m. This meeting was lightly attended and he asked Nyitray if they could have some additional meetings. A few days later, Nyitray gave him approval and there were lunchtime and after work meetings in the cafeterias and auditorium in South Brunswick. These meetings were publicized by a poster on the Union's bulletin board and flyers distributed in the cafeteria. Hollender also testified that in 1988 and 1989 he attended membership meetings chaired by Chen in the cafeteria area at Liberty Street.

One of the allegations here is that the Union's decision to have the membership vote on affiliation with the CWA caused the Respondent to change its policy and restrict the Union's right to conduct meetings at its facilities. In October, Respondent's managers were informed that Respondent ''does not favor affiliation: we fail to see how it will benefit IAPE or our employees.'' The affiliation was voted down by the membership in December; shortly thereafter, Respondent sent a memo to its employees that it was ''gratified'' by the vote.

In about the beginning of October, there were two incidents involving CWA representatives who were removed from Liberty Street and South Brunswick. It is alleged that by these incidents that Respondent violated Section 8(a)(1) and (5) of the Act. The earlier one involved Patricia Wallace, a CWA staff representative, and the latter involved Edward Sabol, a CWA organizing coordinator. Wallace testified that in late September or early October she went to South Brunswick to meet with Keith Jones, secretary-treasurer of the Union. She reported to two security guards and Jones came to meet her. They walked around the facility where she was introduced to some stewards, officers, and active members and met with some members in the cafeteria. While at the facility she walked through the ''corridors'' beside the work areas and when she was introduced to people ''they were in the flow of traffic,'' going for coffee or lunch, but ''not in the work station necessarily.'' After meeting with Jones, she met with Hollender. They walked through the hallways of buildings two, three, and four, and she was introduced to a few people during this brief tour. She remained at the facility for 2 or 3 hours that day. Frank Panella, Respondent's executive director of operations, testified that the work area is an ''open work environment consisting of cubicles'' rather than enclosed offices. There is a common walk area, more commonly referred to as a hallway or corridor. While returning to his office, he ''noticed an individual inside the work area . . . standing either next to, or closely inside of a work sta-

tion, a cubicle . . . .'' Shortly thereafter, he observed her in the ''work cubicle area'' and testified: ''it was brought to my attention from my manager . . . that one of the employees had made a comment to their supervisor that they were being disturbed or annoyed . . . by this individual.'' (This testimony was objected to as hearsay, which, of course it was, and the testimony was admitted, but not for the truth of the statement.) At this point, he saw her with Jones, and called Nyitray and informed him of the situation. Wallace remained in the area for about 35 minutes, and whenever he saw her she was either next to, or within, the work cubicle area. Panella never learned Wallace's name at that time, but when he spoke to somebody in Respondent's personnel department, he was told that she might be from CWA. In answer to questions on cross-examination, he testified that on the two occasions that he observed Wallace (once from about a 30-foot distance and then from a 60-foot distance) she was next to a cubicle. Witham testified that he received a call from Nyitray saying that Panella had told him that a CWA representative was being escorted around the South Brunswick facility. As a result he prepared and distributed a memo, dated September 27, to numerous managers, including Nyitray and Ruffner, stating:

> We have recently been advised that C.W.A. Reps have been invited into some facilities to talk to employees. If you become aware of this in your area, please let me or Frank Barr know immediately.
>
> We do not permit outsiders to solicit our employees. If it occurs, you or the appropriate local management representative should ask the Rep to leave and/or refuse their request to come in.

Wallace did return, a week or two later. She was met at the guard desk by Lynn Healey, location director for the Union, who walked with her to the cafeteria. She testified that they chose a location in the cafeteria that would be out of the way of the flow of traffic and would not cause a disturbance where they sat with their literature which was about the CWA and the proposed affiliation. A couple of employees came by and took some of the literature, but she did not actively distribute it. In addition, a couple of stewards and ''contact people'' came by and spoke to them. After about 30 minutes someone from personnel said that she would have to leave, and she did. Healey testified that she met Wallace and took her to the cafeteria, where they sat down and placed some literature on the table. She remained with Wallace for about 15 minutes; at that time she returned to work because her break was over. During this period Wallace didn't speak to any other employee. As Wallace was being escorted out of the building she stopped by Healey's desk. Nyitray testified that on the day in question he was told by an employee that a CWA representative was in the cafeteria; he immediately went to the cafeteria. He looked around and saw Wallace sitting by herself at a table about 15 feet from the cash register, facing the people coming from the cash register line. There was literature spread out on the table in front of her. Nyitray introduced himself and said that she would have to leave, which she did. Hollender testified that until this incident he was not aware that Respondent prohibited outside organizations from soliciting on Respondent's premises.

Sabol testified that from early summer until the beginning of October, he visited Liberty Street and Lexington Avenue on six or seven occasions, meeting with Chen or other union officers. He went to Liberty Street in about the beginning of October where he met Chen and Ken Martin, vice president of the Union. They sat in a room with glass doors leading to the cafeteria on one side and the hallway on another side. There were booklets and videotapes about the dues and staffing issue as well as affiliation on the table. While they were eating Witham walked in and told them that they would have to leave. When Chen refused to leave Respondent's security officers escorted them out. While they were being removed a union photographer was photographing the situation. Witham testified that he was informed by security that a CWA representative was on the premises. He went to the glass-enclosed area and saw Sabol sitting with Chen and Martin. Literature and videotapes were on the table. He introduced himself to Sabol and said that he would have to ask him to leave because they do not permit solicitation on Respondent's property. Chen said that neither he nor Sabol would leave. Witham contacted security. At that time a woman began to take pictures of the situation and continued to take pictures throughout the incident. When the security people came, they were escorted off the premises. Witham testified that he did not see Sabol speaking to any of Respondent's employees other then Chen and Martin. It is undisputed that this incident occurred shortly after the Wallace incident in South Brunswick.

Colnaghi testified that in about September he asked Jean Calvert, the secretary to Will Horner, the facility's plant manager, for the use of the White Oak conference room for a union meeting. He testified that this was the normal procedure for meetings at the facility. She said that she would speak to Horner to see if the room was available at that time. When he didn't receive a response, he made a written request for the room for October 8 and 9 from 5 to 6 p.m. for a union meeting for the plant's members. About a week later, Horner called him and said that the room would not be made available to the Union because ''it was against company policy.'' By letter dated October 5, Barr wrote to Chen, inter alia:

> On October 2nd we received a letter in White Oak requesting use of our conference and video facilities by IAPE, along with a similar request in San Francisco the preceding week. We have refused both requests and you should be aware that we do not provide our corporate meeting facilities for non-company organizations.
>
> Furthermore, we wish to forestall any future problems with respect to outside CWA representatives attempting to gain entry to our premises for the purposes of solicitation. To the extent you are aware of that potential, please be informed there is a long-standing company policy prohibiting non-employees from outside organizations from entering the premises for solicitation purposes.

Horner testified that Respondent's policy regarding its conference rooms is that they are not to be used for ''non-Dow Jones business purposes.'' When he received Colnaghi's request he notified Nyitray of the request and Nyitray ''just affirmed my understanding of the policy that we

wouldn't allow the conference room to be used for non Dow Jones business,'' and he told this to Colnaghi. He testified that this was the only time he wrote to Nyitray about this subject because it was the only time that a union or outside organization asked for the use of a conference room. Nyitray testified that when he spoke to Horner about Colnaghi's request, he asked him what his past practice had been with the use of conference rooms and told Horner that as long as he was consistent with his prior policy that he should continue with that policy and deny the Union the use of the room.

Keith Bagge, an employee of Respondent in Chicago and a director of the Union, testified that in early October he was told by Martin that Chen would soon be coming to Chicago and would like to talk to the members. Bagge then went to see Ruffner and told her that Chen would be at the facility on October 26 and he would like to have a conference room or meeting room for that day so that Chen could meet with and speak to the union members. She said that it shouldn't be a problem and that she would get back to him. About 2 days later Ruffner told him that she couldn't give the Union a conference room for Chen's visit because it was ''against company policy for outside solicitation or for any solicitation.'' Bagge, who was employed by Respondent from 1973 through 1991 testified that he was ''stunned'' at this response and was not aware that such a rule existed. Ruffner, who was employed by Respondent until February 1991, testified that Respondent has a small lunchroom with two tables at the facility. Respondent also had two unlocked conference rooms, one an advertising conference room, and the other a news conference room. Respondent's policy was: ''We do not conduct meetings on the premises that were not business related to Dow Jones.'' She testified that Bagge told her that Chen would be coming to the facility and they needed a conference room for a meeting. ''My response initially was I would check into it and get back to him . . . .'' She testified that she doesn't believe that she told Bagge that his request would not be a problem, although she may have said, ''No problem, I'll look into it.'' To make sure that she ''was correct on the policy where we still did not allow meetings on the premises . . . .'' she called Barr. After speaking to Barr, she told Bagge that he could not have the use of a conference room for Chen's visit because Respondent did not allow meetings, other than Respondent's business, on its premises.

By memo dated October 12, Barr wrote to Pat Skelly, Respondent's manager of security in New York:

> As a result of the recent incidents involving CWA officials violating our no-solicitation policy, and refusals by IAPE officials to honor our request to abide by that policy, be advised that until further notice, if an IAPE officer or director requests permission for a visitor to come on to our premises, security should immediately notify either the Director of Labor Relations or the Vice President of Employee Relations for their prior approval.

On the same date, Barr wrote to Chen:

> In view of the events of this past Tuesday in the Dow Jones cafeteria at the World Financial Center involving you, other IAPE officials, and representatives of the CWA, and the events at the South Brunswick facility last week involving the CWA's failure to abide by the Company's policy of prohibiting solicitation by outside organizations on company premises, be reminded that Dow Jones does not allow solicitation by any outside organizations on Dow Jones premises. In furtherance of that policy, and in light of the above recent events, CWA representatives, officials, and employees are not allowed in Dow Jones facilities, whether or not accompanied by Dow Jones employees. The Company's security personnel have been so advised. We trust you will advise your officers, directors and colleagues as well.

On about October 1, the Union posted notices announcing that the annual membership meetings would be held on October 24 and 25 at Liberty Street and South Brunswick. The topics to be discussed were stated as the hiring of a full-time staff person, affiliation with the CWA, and a dues increase. By letter dated October 17, Barr wrote to Chen:

> It has come to our attention that you have scheduled IAPE's annual meeting in our South Brunswick and New York cafeterias. As we have already informed you, we do not allow non-Company organizations to use our facilities for meetings, and therefore must deny IAPE the use of our premises for your Annual Meeting. We appreciate your cooperation in seeing to it that your meeting is held off premises.

By letter to the staff dated October 11, Barr notified them of the Wallace and Sabol incidents and stated: ''despite the Company's long standing policy designed to ensure a workplace free of solicitations and other intrusions—that non-employees may not come on Company premises for the purpose of soliciting on behalf of an outside organization.'' The letter further stated that Respondent ''supports a full and fair debate on the pros and cons of affiliation and we don't mean to stand in the way of that debate. Clearly, however, IAPE and the CWA have plenty of means for making their views known without intruding into the workplace.''

By memo dated October 17, to his managers, Barr wrote, inter alia:

> Please be advised that our policy is that our corporate premises are not provided for meetings of any outside organizations, including IAPE. If such a request is made at your location, it should be denied. Likewise, if a meeting is scheduled without your knowledge and held . . . you should request that the meeting cease as soon as you become aware of it.
>
> While IAPE Officers and Directors have a right as employees to use our cafeteria facilities in normal fashion and talk with co-employees while on break, they do not have the right, and should not be allowed, to turn such a privilege into an IAPE meeting and disrupt the normal functioning of our cafeterias.

Chen testified that due to Respondent's restriction on holding meetings at its facilities, the Union did not have its annual membership meetings in South Brunswick or Liberty Street. He also testified that between October and April 1992, he had lunch with employees at South Brunswick on about six occasions. Nyitray testified that Respondent's policy is not to allow third parties onto its property to meet with

employees. In this regard he has refused to permit a number of organizations to come to Respondent's facilities. Among them has been the United Way, a local health club, a child care provider, and an oil change operation. Witham testified that Respondent's policy is to prohibit outsiders from soliciting its employees, and this has been the rule for the 27 years that he has been employed by Respondent. He considers the Union an ''outside organization.'' It was not until October that Respondent issued letters and memos about this rule because that was when the CWA people came onto the premises and violated the rule. Presumably, prior to this, there had not been such obvious violations of the rule. Barr testified that Respondent's rule is not to allow outside organizations to come on to the premises to solicit employees and not to let other groups use its facilities unless there is a Dow Jones business-related purpose to it, and this has been true since he began his employ with Respondent in 1978.

The General Counsel and the Charging Party allege that Respondent's restrictions on its meetings at the facilities should be found to be unlawful because they have been disparately applied. In this regard, the evidence establishes that Respondent has permitted HMO and health plan representatives, art shows, meetings of the Minority Network, and the Women's Network, smoke-ending, and Weight Watchers Programs, as well as other programs on its premises while, allegedly, denying the same access to union meetings.

The latest agreement and, presumably, all recent agreements, between Respondent and the Union provides for health care coverage for its employees. Respondent generally makes available to its employees three plans, a comprehensive medical plan administered by Aetna Insurance, as well as HMO plans. There are about 25 different HMOs offered by Respondent throughout all of its offices, usually 2 at each location. Each year there is an open enrollment period in November. At that time there is literature available at the facilities on the different plans; representatives of the plans are also present on Respondent's premises during this period to answer employees' questions.

Respondent also has regular (often monthly) art exhibits in the employee lounge opposite a cafeteria at South Brunswick. Fliers containing information about the artist (most of whom are not Respondent's employees), as well as the prices of each painting exhibited, are posted and distributed throughout the facility. The artist is present for a few days during the display to answer employees' questions. The idea of art shows was conceived by Rose Herbeck, who had been employed by Respondent until about early 1992. While employed, she was given paid time to arrange and set up the exhibit. Since leaving Respondent's employ, she has been paid $50 a month, plus expenses, to set up these exhibits. Although the flyers announcing the exhibits gives prices for each of the paintings, Nyitray and Barr testified that each participating artists signs an agreement not to engage in any sale. Received in evidence was such an agreement dated in 1986 which states:

> No sale of art work shall be effected on Dow Jones' premises. You have the right to place next to the Art Work your business card or a small sign identifying yourself as the owner and/or artist of the work.

As to whether he is aware that some of these paintings have been sold on Respondent's premises during their exhibition, Nyitray testified: ''I know that there have been sales, as to the timing of those, I do not know.''

Respondent also provides access to its facilities, as well as technical and limited financial support, to the Dow Jones Women's Network (the Women's Network) and the Dow Jones Minority Employees' Association (the Minority Association). The Women's Network issues a newsletter, apparently monthly, entitled ''Images,'' which is posted throughout the facilities and sent through interoffice mail to members and others. In addition, Respondent's newsletter, entitled ''DJ Bulletin,'' lists the dates and locations of upcoming meetings of the Women's Network and the Minority Association. The DJ Bulletin, dated October 23, 1989 states:

> Some minority employees have suggested establishing a minority network similar to the Dow Jones Women's Network that South Brunswick employees have organized to meet regularly to help each other. The company supports such efforts with meeting space and other encouragement.

Donald Miller, Respondent's vice president of employee relations, testified about these two organizations. The Women's Network is a group of employees that discusses issues relevant to women and acts as a liaison between the female employees and Respondent. The Minority Association likewise discusses issues that are relevant to minority employees and acts with Respondent on these issues as well. These groups discuss issues related to their employment with Respondent, as well as issues involved in their community. Respondent supports these organizations, in the form of meeting space, printing their newsletters, transporting people to their meetings, occasional ''modest honoraria'' to speakers at their meetings, and some refreshments. These two groups are useful to Respondent for their affirmative action program in that Respondent ''references'' them as organizations that Respondent deals with. They meet during worktime, for which the employees are paid. Barr testified that the Women's Network and the Minority Association are integral parts of Respondent's affirmative action program. In that regard Respondent supports them in the form of meeting space, refreshments, and payments for outside speakers, although most of the speakers at their meetings are Respondent's officials. He considers their meetings to be a Dow Jones business-related purpose. In differentiating these groups and the Union, Barr testified that he considers their activities to be ''business related,'' because ''fostering and encouraging the Women's Network and Minority Network is all part of our affirmative action obligations.''

Respondent has also granted access to Weight Watchers and smoke-ending meetings on its premises. Nyitray testified that Respondent permitted this and agreed to reimburse the Weight Watchers participants for half their fee if they maintained their weight loss. This was part of Respondent's health program. There were two sessions for Weight Watchers of 10 weeks for each session. Respondent reimbursed the employees for the first session only. Respondent provided its employees around the country with smoke-ending programs at about the time that it curtailed smoking in most areas of its facilities. Respondent paid for these programs and let the

employees attend them at its facilities. Barr testified that the Weight Watchers programs and the smoke-ending programs were ''business related'' because they contribute to a healthier work force and, hopefully, lower health costs.

Healey testified that for the year and a half prior to the hearing here, a company named Firminage Scent and Flavor Company had its representatives at South Brunswick. Employees were invited to go to the lounge area and participate in a survey of testing different scents of the company, for which they were paid $10. Dee Worthington, a communications supervisor at South Brunswick, coordinated the program. Healey participated on six occasions, the last being in December 1991. Hollender testified that fellow employees told him that they participated in the ''sniff test,'' but he never did. Witham and Barr each testified that until they heard the testimony here about Firminage, they were not aware of its presence at their facility. Barr testified that Worthington is the direct supervisor of four or five telephone operators at South Brunswick.

There was also testimony that, in Chicago, employees were offered discounts to a health club and a leather shop, as well as free checking at a nearby bank. Ruffner testified that the health club offer was part of Respondent's wellness program; Respondent paid $250 of the fee for those who joined. As for the bank and leather shop, Ruffner testified that it was ''another freebie that I just stuck into the new hire packets and posted on the bulletin board.'' Ruffner testified that she could not remember any representatives of these organizations being on the premises to speak to the employees, although the health club representative came to the facility and spoke to her.

IV. ANALYSIS

The amended complaint alleges that Respondent violated Section 8(a)(1) of the Act by refusing the use of Respondent's facilities for a union meeting of its employees at White Oak and Respondent's facility in San Francisco, California. As no evidence was adduced regarding the San Francisco facility, I recommend that the allegation in that regard be dismissed. The complaint also alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing the use of its facilities for union meetings of its employees at its Chicago facility, its New York facilities, and the South Brunswick facility. The amended complaint further alleges that Respondent violated Section 8(a)(1) and (5) of the Act by removing Wallace and Sabol from South Brunswick and Liberty Street, and by informing the Union, by letter on about October 17, that it would not be allowed to use Respondent's facilities for its meetings. Finally, the amended complaint alleges a violation of Section 8(a)(1) and (5) of the Act by Respondent deviating from its past practice of allowing the Union access to its facilities without affording the Union an opportunity to bargain about the change.

Two recent Board decisions address the 8(a)(1) issue, stressing the importance of disparate treatment. In *D'Alessandro's, Inc.*, 292 NLRB 91, the Board overturned the administrative law judge's decision and found a violation of Section 8(a)(1) of the Act based on disparate treatment. The Board quoted from *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which stated:

> [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message *and if the employer's notice or order does not discriminate against the union by allowing other distribution*. [Emphasis added by the Board.]

The Board then quoted from *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), which stated:

> For nonemployee union organizers to gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or *that the employer's access rules discriminate against union solicitation*. [Emphasis added by the Board.]

In finding a violation, the Board stated that ''Respondent's property was regularly the scene of a wide range of commercial and other activity unrelated to the operation of the store.'' In *Davis Supermarkets*, 306 NLRB 1, the Board found that the employer violated the Act because of its disparate treatment of denying access to the union while permitting access to others. The Board also found that the Supreme Court's decision in *Lechmere v. NLRB*, 502 U.S. 527 (1992), did not disturb the Court's language from *Babcock & Wilcox* stated above.

If anything, the General Counsel has a stronger case than *D'Alessandro's* and *Davis* because the instant matter involves access and meeting rights of *employees*, not union organizers, as was involved there. In *Columbia University*, 225 NLRB 185 (1976), the Board found that the university violated the act by denying access to an organizing committee composed solely of its employees, while allowing recognized union groups, and outside groups, to use the denied facility for a variety of purposes.

In the instant matter, Respondent refuses to allow the Union, made up entirely of its employees, to conduct meetings at its premises. At the same time, Respondent allows other organizations to use these facilities with few, if any, restrictions. There are monthly art shows at South Brunswick arranged by former employee Herbeck during her worktime. Since Herbeck has left its employ, Respondent pays her $50 a month for her work with the art show. It is clear that even though the artists contracted not to sell the paintings at the facility, paintings have been sold during the exhibits. I can think of no other reason for listing the prices of the paintings. The Women's Network and the Minority Network meet at Respondent's facilities during working time, with technical and financial assistance from Respondent, and with employees and nonemployees as speakers. In addition, Respondent distributes and displays the announcements of their meetings. For the past few years Respondent has had Weight Watchers and smoke-ending programs at its facilities; at one time, Respondent reimbursed employees for half the Weight Watchers fee if they maintained their weight loss. Counsel for Respondent defends that the use of Respondent's facilities ''has been limited to organizations or meetings that are work related or that have a Dow Jones business purpose.''

These activities at its facilities are commendable and are not to be discouraged, but to allege that they are work related or have a Dow Jones business purpose is not persuasive. The art shows are good for employee morale, and the Women's Network and the Minority Network serve as good communication lines for Respondent, as well as assisting it in its obligations under the antidiscrimination laws. The Weight Watchers and smoke-ending programs, if effective, would improve the health of its employees and lower Respondent's medical insurance costs. But these activities are no more business related than is its relationship with the Union. Respondent seems to forget that the Union is the collective-bargaining representative of about 2000 of its employees, and it has responsibilities under the National Labor Relations Act as it does with the Women's Network and the Minority Network under affirmative action programs. Respondent cannot lawfully provide access to one and not the other. I therefore find that by providing access to these organizations while denying access to the Union, Respondent violated Section 8(a)(1) of the Act.[2]

It is next alleged that by removing Wallace from South Brunswick, and Sabol from Liberty Street Respondent violated Section 8(a)(1) and (5) of the Act. This situation involves nonemployees who have less right to be on the Employer's premises than employees. Wallace and Sabol were with employees at the time, apparently, answering questions about the possible merger of the unions. They were clearly not disruptive when they were first asked to leave, although the Union and the CWA appeared to anticipate that Sabol would be asked to leave since they just happened to have a photographer present to photograph the incident for the next union newsletter. Although this indicates that the Union may have set up Respondent with this incident in the hope of galvanizing the membership to support the merger, the fact remains that Respondent removed Wallace and Sabol, while at the same time allowing numerous other nonemployees to solicit at its facilities. I therefore find that by removing Wallace and Sabol from South Brunswick and Liberty Street, Respondent violated Section 8(a)(1) of the Act.

Finally, it is alleged that by departing from its past practice of permitting the Union to have access for its meetings at South Brunswick, Chicago, and its New York facilities, without first negotiating with the Union about the change, Respondent violated Section 8(a)(1) and (5) of the Act. The General Counsel's witnesses testified to situations that (he claims) establish that prior to the fall of 1990 the Union could use Respondent's facilities for meetings, without restriction. Respondent denies that such availability ever existed and cites examples from 1987 and 1989 to prove it. The evidence establishes that in about July 1987, Nyitray expressed concern to Barr about a union notice announcing that Chen would be in the employees' lounge at South Brunswick to answer questions of the members. After Barr agreed with his concern, Nyitray spoke to Judd and the notice was removed. Chen wrote to Nyitray inquiring about what he felt was ''objectionable'' about the notice, ending by saying that he planned ''frequent lunch gatherings'' to introduce himself to union members at South Brunswick. There is no record of any written response by Respondent.

The other incident occurred in late 1989. At that time, the Union posted a notice, dated November 7, 1989, that the Union's annual membership meetings would take place on December 11 and 12, 1989, in the cafeteria in Liberty Street and South Brunswick. On learning of this notice, Barr called Chen and told him that they did not allow meetings in their cafeterias, because it would be disruptive to those employees who were eating there. When Chen responded that in the prior year only two or three people came to see him, Barr said that he wasn't aware that there had been a meeting the prior year. Chen said that if he didn't know about it, it couldn't have been disruptive; he also told Barr that the Union's bylaws required a meeting in each calendar year. After discussing the matter with Witham, Barr told Chen that he would ''accomodate'' the Union and allow the meetings to be held because there was not much time left for the Union to have its meeting, and because ''it really wouldn't amount to a meeting in the true sense of the word.''

On the basis of all of the above, I find that the General Counsel has failed to establish that there was a past practice of allowing the Union free access to its facilities for meetings. As his witnesses testified, there were occasions when Respondent's agents gave them use of the facilities for meetings, and invited future use. However, with over 100 offices worldwide, it would be difficult for Respondent to know about each office's policy. More importantly, in 1987 and 1989, prior to the proposed merger with CWA, Respondent objected to proposed union meetings and informed Chen that such meetings were against Respondent's policy. For these reasons I find that the General Counsel has not established that this policy existed prior to the fall of 1990, and I therefore recommend that this allegation be dismissed.

Because some of the allegations here overlap, a summary of my findings might be useful. I find that Respondent has violated the Act as alleged in paragraphs 9(b), (c), (d), (e), (f), (g), and 10 of the complaint, but has violated Section 8(a)(1) of the Act, not Section 8(a)(5) as also alleged. I find that Respondent has not violated the Act as alleged in paragraphs 9(a), 11, and 12 and recommend that these allegations be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and the CWA are each labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by refusing to permit the Union to use its facilities for meetings of its members while permitting numerous other organizations use of these facilities.

4. Respondent violated Section 8(a)(1) of the Act by removing Wallace and Sabol from its South Brunswick and Liberty Street facilities.

5. Respondent did not violated Section 8(a)(5) of the Act as further alleged in the consolidated amended complaint.

REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

[2] I did not discuss access to HMO representatives and vendors because these truly are business related.